Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

LEE YEAGER,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a prospective job applicant have "standing" to complain of being refused an application for employment just because of his race and gender?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Lee Yeager, an individual citizen of the United States, residing in the Northern District (Eastern Division) of Ohio. Petitioner has no corporate affiliations. He was Plaintiff in the District Court and Appellant in the Sixth Circuit Court of Appeals.

David Polonus was also a Plaintiff in the District Court and Appellant in the Sixth Circuit Court of Appeals; however, he declines further participation in these proceedings.

Respondent

Respondent is General Motors Corporation, a corporation having publicly-traded stock. Petitioner is unaware of any publicly-held company owning ten percent (10%) or more of GMC stock. Respondent was Defendant in the District Court and Appellee before the Sixth Circuit Court of Appeals.

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JURISDICTIONAL STATEMENT

The judgment of the Sixth Circuit Court of Appeals was entered 6/11/03. The Court of Appeals entered an Order denying a timely Petition for Rehearing, with Suggestion for Rehearing En Banc, on 7/23/03.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1); and the timeliness of Petitioner's filing is governed by Supreme Court Rules 13.1 and 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article III, Section 2, Clause 1 of the U.S. Constitution and 42 U.S.C. §2000e (Title VII of the Civil Rights Act of 1964), prohibiting discrimination in employment.

STATEMENT OF THE CASE

42 U.S.C. §2000e provided the federal court jurisdiction for this Title VII employment discrimination action brought in the U.S. District Court for the Northern District of Ohio (ED), There, the case was dismissed on summary judgment. On the "standing to complain" issue alone, that dismissal was affirmed on appeal to and rehearing denied in the U.S. Court of Appeals for the Sixth Circuit. Here, plenary review is sought on petition for writ of certiorari.

In 1983, Respondent, General Motors Corp. ("GM"), its employees' union and the Equal Employment Opportunity Commission entered into a Conciliation Agreement that provided for GM to "make good faith efforts to assure that minorities are at least 15.5% of those chosen for apprenticeship openings, and women are at least 12.0%." That Agreement expired 12/31/88.*

Despite the Conciliation Agreement's termination nearly fifteen years ago and without regard to the significantly-lower local workforce percentage availability, GM has maintained fixed percentages of minorities and women in its skilled-trades apprenticeship job classifications through a number of so-called "reverse" discriminatory practices in its apprentice selection process. Among those practices is "Targeting."

For prospective job applicants ("candidates") such as Petitioner, Lee Yeager, "targeting" occurs at the inception of the selection process after the candidates' basic qualifications, race and gender are determined via completion of a Request for Apprenticeship Information form ("RFAI"), Only minority and female candidates then deemed "qualified," aka the candidates "targeted" for bypassing the "random draw," together with a designated number randomly-drawn from the remaining pool of candidates, advance to the apprenticeship orientation and application session. There, employment applications are provided for completion preliminary to testing, interview and ultimate hiring, To the candidates whose RFAI's are neither targeted nor randomly drawn, no further consideration is given.

---

* For additional historical background, see *Plott v. General Motors Corp.*, 71 F.3d 1190 (6th Cir. 1995), *cert. denied*, 517 U.S. 1157, 134 L.Ed.2d 649 (1996)

In 1995, Petitioner Yeager was a Caucasian male candidate for apprenticeship at GM's Packard Electric plant in Warren, Ohio. Although "qualified" for invitation to Packard's apprenticeship orientation and application session, Yeager was not "targeted" for same because of his race and gender; and his RFAI was not randomly drawn to so advance.

ARGUMENT

The U.S. Court of Appeals for the Sixth Circuit Has Decided an Important Federal Question In a Way That Conflicts With the Relevant Decisions of This Court

Despite the clarity of this Court's views on "standing" to complain of unlawful discrimination, most recently articulated in *Gratz v. Bollinger*, 539 U .S. ____, 156 L.Ed.2d 257 (2003), at 276 citing *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666, 124 L.Ed.2d 586 (1993):

> "[t]he 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit .... And in the context of a challenge to a set aside program, the 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of contract."

the Sixth Circuit has adopted and maintains the opposite view. Below, it insists that Petitioner lacks standing to complain of "targeting" by failing to prove that he would have been hired into apprenticeship in the absence of that discriminatory employment practice. At p. 7 of its Opinion, with allusion to

Yeager v. General Motors Corp., 265 F.3d 389 (6th Cir. 2001), the Court writes:

> "This scenario cannot provide the requisite 'injury in fact' for a Title VII claim because it fails the 'but for' test: 'but for' GMC's affirmative action measures, [Polonus and] Yeager would still not have been selected for the programs at issue."

This Court should grant certiorari to arrest and rectify, and thereby prevent the proliferation of such antithetical understanding and expression of "standing" to complain of unlawful discrimination.

CONCLUSION

For this reason, the Court should grant the Petition.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-4343

[Filed July 23, 2003]

LEE YEAGER, ET AL., Plaintiffs-Appellants,	)
v.	)
GENERAL MOTORS CORPORATION, Defendant-Appellee.	)

BEFORE: GUY, BOGGS, and DAUGHTREY, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-4343

[Filed June 11, 2003]

LEE YEAGER, et al.,
Plaintiffs-Appellants,

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Ohio

JUDGES: BEFORE GUY, BOGGS, and DAUGHTREY, Circuit Judges.

OPINION

PER CURIAM. The plaintiffs, Lee Yeager and David Polonus, brought this suit against General Motors Corp., alleging that the failure to hire them into apprenticeship programs at two GMC plants was due to discriminatory employment practices, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. Yeager had earlier

brought a similar suit against GMC, *Yeager v. General Motors Corp.*, 265 F.3d 389 (6th Cir. 2001) *(Yeager I),* challenging the company's affirmative action program at the Lordstown Assembly plant. In this case, Polonus challenges the same selection process at the Lordstown Assembly plant, and both Polonus and Yeager challenge a substantially similar process at GMC's Packard plant.

In *Yeager I,* we affirmed the district court's grant of summary judgment for GMC on Yeager's claims, on the grounds that he did not have Article III standing to bring the claims, having suffered no injury as a result of the affirmative action program at issue there, and because he had not established a prima facie case of race discrimination.

Here, the district court granted GMC's motion for summary judgment on the same alternate grounds that formed the basis for our opinion in *Yeager I:* (1) that plaintiffs lacked standing to challenge hiring procedures that had no effect on their failure to obtain employment with GMC; and (2) that plaintiffs could not establish a prima facie case of race discrimination because they cannot establish that GMC is that unusual employer that discriminates against the majority. We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

In this case, Yeager and Polonus allege that GMC discriminated against them by failing to hire them into the program at the Packard Electric plant in Warren, Ohio, in 1995, and Polonus alleges that GMC discriminated against him by failing to hire him into the program at the Lordstown Assembly plant in 1996.

In *Yeager I,* we gave the following description of the application process for the company's apprentice program:

> GMC recruits applicants into its skilled trade positions (e.g., Truck Repair, Tool Making) through its apprentice training program ... GMC administers its apprentice program in compliance with its collective bargaining agreement with the International Union UAW ...
>
> GMC seeks apprentice applicants by publishing notices with information about the program and the application process. White males interested in the apprentice program must submit applications. GMC accepts a limited number of applications each hiring period on a first-come, first- serve basis. GMC sends completed applications to an independent firm that randomly selects a specified number of applicants who are then permitted to take a written examination. In addition, GMC seeks qualified minority and female applicants to the apprentice program through its contacts with local minority and female employment organizations. Each applicant lists the top three skilled trades for which they want to be considered.
>
> White male applicants that are randomly selected take a written exam that evaluates their general abilities in areas such as mathematics and reading comprehension. Recruited minority applicants and female applicants are permitted to take the written examination without being randomly selected. If an applicant has previously taken an exam at another GMC plant, and

is randomly selected, the applicant may have their previous test score transferred.

Applicants are ranked by their written exam score. The top thirty percent of minority applicants, female applicants, and white male applicants are interviewed. Applicants receive another score for their interview performance.

Applicants receive an overall ranking for each skilled trade based on the sum of their written test and interview scores. The highest possible score is seventy-two. Apprenticeship selections are based solely on the applicants' total scores.

GMC keeps separate lists for seniority applicants and nonseniority applicants pursuant to the terms of its collective bargaining agreement with the UAW. Thus, for every two seniority applicants offered apprenticeships, only one nonseniority applicant may be offered an apprenticeship.

Applicants' ranked positions on the seniority and nonseniority lists may change in the following three ways: (1) as new applicants are tested and added to the list; (2) as applicants are selected for apprenticeships and taken off the list; and (3) when applicants are allowed to retest and the overall rankings are readjusted. The initial overall rankings for each skilled trade are generated without regard to race or sex. However, minority and female applicants may attempt to increase their total scores by participating in

GMC's Pre-Apprentice Training Program ... and the overall rankings are adjusted accordingly.

GMC conducts a training program for minority and female applicants whose scores are near the selection range. The training program provides additional training to minority and female apprentice program candidates. Following their training, minority and female applicants may take a written test that may improve their total score by up to seven points. However, the training program participants may not receive a total score exceeding the maximum possible score of seventy-two. The training program's participants' test points are added to their total scores, and the overall rankings are adjusted accordingly.

Yeager is a nonseniority white male. He applied to the apprentice program at GMC's Lordstown Assembly Plant in 1989. He took his first written exam in 1989 and was interviewed in 1990 for his selected three positions (Truck Repair, Tool Making, and Pipefitting). He attained his highest score, fifty-three, in Truck Repair. In 1991, four seniority positions and one nonseniority position in Truck Repair became available. The nonseniority position was filled by a white male with a score of sixty-eight, fifteen points higher than Yeager's score. In 1993, a new apprentice class was selected, but only two seniority and no nonseniority positions opened in Truck Repair.

In 1996, Yeager exercised his option to retake the written exam and changed his Truck Repair preference to Millwright. After his interviews, Yeager achieved

a total score of sixty in Millwright, fifty-seven in Tool Making, and fifty-five in Pipefitting. Later that year, GMC selected apprentices for its Assembly Plant. Thirteen seniority and six nonseniority Millwright apprenticeships became available. Six seniority and three nonseniority Pipefitting apprenticeships became available. Yeager's total score placed him fourteenth among the nonseniority white males for Millwright, twenty-fourth for Pipefitting, and thirty-sixth for Tool Making. The top fifty candidates for the apprentice positions were all white males and Yeager was not among them. After the training program points were factored into the overall rankings, thirty-eight white males were accepted into the apprenticeship program. Women and minorities who had scores lower than Yeager's before they participated in the training program were selected for the apprenticeship program.

In 1997, Yeager applied to the apprentice program at GMC's Lordstown Fabrication Plant. The Fabrication Plant is a separate facility from the Assembly Plant and it has its own, separate, apprentice program. Applicants with a previous score at another GMC facility may have their total score applied to the Fabrication Plant apprentice program but they must first go through the random selection process. Yeager was not randomly selected for the nonseniority applicant list and, therefore, his scores were not transferred.

Yeager I, 265 F.3d 389, 392-94.

The district court found in this case that Yeager I was controlling as to Polonus's claim regarding the Lordstown Assembly plant, pointing to our holding that Yeager had no standing because his final raw score was not within the top 50 white males. It followed, the district court held, that there was no causal connection between GMC's affirmative action programs and its failure to accept Yeager into the apprenticeship program. The court held that Polonus had likewise failed to demonstrate that he was injured by the affirmative action programs, because his raw score was also not within the top 50 white males on the consideration list.

In addition, the district court found that the plaintiffs did not have standing regarding the Packard plant claims. Neither Yeager nor Polonus had been selected in the random drawing that determined which candidates were interviewed. However, even if they had been selected by the drawing, and assuming that each achieved the highest possible interview score, neither would have ranked high enough to be selected for the apprenticeship programs even if none of the practices challenged by the plaintiffs had been in place. That is, both were outranked by more white men than there were total spaces in the apprenticeship programs.

Finally, the district court found that the mere fact that GMC administers affirmative action programs does not constitute direct proof of intentional discrimination against the majority sufficient to make out a case of race discrimination.

DISCUSSION

To establish *Article III* standing, a plaintiff must "allege personal injury fairly traceable to the defendant's allegedly

unlawful conduct and likely to be redressed by the requested relief." *County of Riverside v. McLaughlin*, 500 U.S. 44, 51, 114 L. Ed. 2d 49, 111 S. Ct. 1661 (1991)(citation omitted). Three essential elements must be proven for a plaintiff to satisfy standing requirements: (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. *N.E. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla*, 508 U.S. 656, 663-64, 124 L. Ed. 2d 586, 113 S. Ct. 2297 (1993). Moreover, when a white male is alleging "reverse" discrimination, he must prove that "but for the [affirmative action] program, he would have been considered for the job." *Yeager I*, 265 F.3d at 395.

In order to avoid the same outcome as in *Yeager I,* the plaintiffs in this case offer a "denial of equal access" argument in which they assert that they may make a Title VII claim because, had they been minorities or women, they could have been admitted to the apprenticeship programs based on their raw scores. However, this argument ignores the fact that, in order to gain admission to the apprentice program, Polonus and Yeager would have had to benefit from the minority program, while all other white males did not. In other words, Yeager and Polonus would not have been hired *unless* they were given preference over more highly qualified white men. This scenario cannot provide the requisite "injury in fact" for a Title VII claim because it fails the "but for" test: "but for" GMC's affirmative action measures, Polonus and Yeager would still not have been selected for the programs at issue. The instant case, then, presents the same claim at issue in *Yeager I,* despite plaintiffs' attempts to rearticulate the claim in a different form.

Nor do we believe that this case can otherwise be distinguished from *Yeager I*. The plaintiffs argue that Yeager sought injunctive relief in the prior case, in addition to retrospective damages, while in the instant case Yeager and Polonus sought only retrospective relief in the form of damages. This distinction has no impact on Article III standing. The plaintiffs still must show that they suffered an "injury in fact" in order to bring a claim under Title VII.

Given the plaintiffs' failure to establish standing, we find it unnecessary to address the district court's alternative basis for dismissal. We specifically decline to address the district court's ruling on equitable tolling of the applicable statute of limitations.

CONCLUSION

Having had the benefit of oral argument, and having studied the record on appeal and the briefs of the parties, we are not persuaded that the district court erred in dismissing the complaint for lack of standing. Because the reasons why judgment should be entered for the defendant have been fully articulated by the district court, the issuance of a more detailed opinion by this court would be duplicative and would serve no useful purpose. Accordingly, we AFFIRM the judgment of the district court for the reasons noted above and based upon the reasoning set out by the district court in its memorandum opinion dated December 17, 2001.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 4:00CV2519
JUDGE DONALD C. NUGENT

[Filed December 17, 2001]

Lee Yeager, *et al.*,	)
Plaintiffs,	)
	)
v.	)
	)
General Motors Corporation,	)
Defendant.	)
	)

MEMORANDUM OPINION

This matter is before the Court on the Defendant's Motions for Partial Summary Judgment (ECF #31--as to Count I and ECF #42 as to Count II). Together the motions seek summary judgment on Plaintiffs' Supplemented Fourth Amended Complaint in its entirety. For the reasons discussed below, the motions are granted.

I. FACTUAL BACKGROUND

Plaintiffs Lee Yeager and David Polonus brought this action against Defendant General Motors Company ("GMC") under Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e *et seq.* Plaintiffs allege that Defendant discriminated against them on the basis of their race (white) and sex (male) by failing to admit Yeager and Polonus into Defendant's Apprentice Program at its Packard Electric plant in Warren, Ohio[1] and by failing to admit Polonus into the Apprentice Program at Defendant's Lordstown Assembly plant. Specifically, Plaintiffs allege that certain "remedial and affirmative action" undertaken by GMC in conjunction with a conciliation agreement entered with the Equal Employment Opportunity Commission in 1983 constitutes unlawful discriminatory employment practices in violation of Title VII. The practices complained of include: 1) targeting minority and female applicants for bypassing the random draw for apprentice selection ("targeting"); 2) categorical determinations of interview eligibility ("30/30/30"); 3) the Pre-Apprentice Training Program ("PAP"); 4) different "degree of difficulty" apprentice selection retests ("DDD"); and 5) selective, non-PAP re-interviews ("Selective Reinterviews"). The conciliation agreement terminated on December 21, 1988.

The skilled trades apprentice training program is jointly administered by GMC and the International Union IUE ("IUE") pursuant to collective bargaining agreements between

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[1] Packard is now owned by Delphi Automotive Systems, Inc.

GMC and the IUE.[2] The apprentice selection process begins when interested persons fill out an application (known as a Request for Apprentice Information ("RFI")), indicating their interest in a position at a particular plant.

After all of the RFI's are collected, they are sent to an independent testing firm. A random draw is then conducted to select a specific number of applications. Those selected are offered the opportunity to take a written apprentice exam, which covers topics such as mathematics and reading comprehension, and is used to rank candidates. If an individual had already been tested at another GMC plant and was selected in the random draw, he or she would be permitted to have those previous test scores transferred. (Pursuant to GMC policy applicable to all applicants, an individual must remain on an applicant list for a period of at least one year before taking a second apprentice test at a new location.)

The applicant pool for apprentice training positions had historically been dominated by white males. In an effort to increase the number of minorities and women in the applicant pool, the Packard plant began a targeted recruiting process in 1995. The minority or female candidates who completed a RFI were invited to sit for the apprentice exam without going through the random draw process. This process did not effect the pre-determined number of candidates to be selected in the random draw.

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[2] The process was substantially similar at both the Packard plant and the Lordstown Assembly plant.

The applicants whose test scores were high enough (in the top 30% of all apprentice scores nationally) would be given a personal interview. The 30/30/30 determination referred to by Plaintiffs is the segregating of the test scores into three categories--minority, female and non-minority. The highest ranking approximately 30% of each group based on the total test scores were identified as "interview eligible." Applicants were given an interview score by each interviewer in each skilled trade for which the applicant sought employment. The applicant's exam and interview scores were combined to form a final raw score, used to rank applicants in the particular trades for which they applied. The highest possible score in any given trade was 72.

Once the candidates are ranked, the Local Apprentice Committee conducts a race/sex review of the rankings to determine whether a sufficient number of minority and female candidates have scores high enough to be selected for apprenticeship without further action. If the numbers of minority or female applicants with sufficient scores is too low to meet the affirmative action goals, applicants whose scores are almost high enough or "near competitive" are invited to participate in a program called Pre-Apprentice Training Program ("PAP"). The PAP is a program that allows women and minorities to add up to seven points to their score.

After the PAP is concluded, the apprentice applicants are again descending-order ranked and listed by their respective scores in each trade. Once ranked, applicants remain on an applicant list from which GMC draws names to fill apprentice training positions as they became available. Each time GMC decided to place additional persons into the apprentice training program, the testing and interview process was conducted and

the scores of the new applicants were added to the applicant lists in respective rank order.

There was a separate list for GMC seniority employees seeking a skilled training apprentice training position. Under the national agreement, GMC was obligated to hire applicants into its skilled trade apprentice training program at a ratio of at least two seniority employees to every non-seniority individual.

In January 1995, the joint committee at the Packard plant sought to place a class of apprentices. Over 2000 individuals, including the Plaintiffs, filled out RFI' s seeking admission to the apprentice program. The joint committee had pre-determined that 100 individuals were to be selected in the random draw. Neither Plaintiff was selected in the random draw and thus neither was considered further for employment at the Packard plant.

Both Plaintiffs exercised their option to take the apprentice test a second time at the GMC Lordstown assembly plant in 1996, where each Plaintiff had tested previously in 1989. Polonus achieved a test score of 26 and Yeager achieved a test score of 33.[3] Polonus' score of 26 was not high enough to be

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[3] Yeager's application to the Lordstown assembly plant is not at issue in this action since it was the subject of another action, *Yeager v. General Motors Corp.*, F.Supp.2d (N.D. OH 2001), *aff'd*, 265 F.3d 389 (6th Cir. 2001), *rehearing denied*, No. 00-3026 (Nov. 1, 2001)("Yeager I").

considered for an interview and he was not considered further for employment at that time.[4]

Even if Polonus had been permitted to interview and had achieved the highest interview score possible (27), his final ranked score (test score plus interview score) would have been 53. Polonus had selected three trades on his application: electrician, welding equipment maintenance and repair ("WEMR") and stationary engineer. The committee had decided that it would seek the following number of apprentices in each of the five following trades: pipefitters (9); millwright (18); electricians (11); WEMR (7); and tool makers (5). These numbers were further reduced for non-seniority applicants like Polonus. Under the collective bargaining agreement, GM was required to place individuals into the apprentice program at a ratio of two seniority employees to one non-seniority individual. Thus, at most there would be 3 non-seniority electrician positions, 6 non-seniority millwright positions, 3 non-seniority pipefitter positions, 2 non-seniority WEMR positions, and 1 non-seniority tool maker position.

The preliminary list of the top 50 candidates for the 1996 apprentice program consisted of 50 white males. Polonus would not have been ranked in the top 50. The lowest non-seniority applicant on the preliminary list had a rank score of

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[4] There is some confusion over the order of Polonus' test scores. GMC indicates that Polonus scored 22 on the 1989 apprentice test and 26 on the 1996 apprentice test. Polonus reverses those numbers. In any event, the order of the test scores is immaterial. It is clear that Polonus would not have been selected for any apprentice program with either score.

62. In Polonus' selected trades, the lowest non-seniority electrician score was 66, and the lowest non-seniority WEMR score was 65. In the electrician trade, 84 non-seniority white males had higher raw final scores than Polonus' highest possible final raw score, and only 3 of those 84 were listed among the top 50 prior to any affirmative action by GMC. In the WEMR trade, at least 78 non-seniority white males had higher raw final scores that Polonus could have achieved, and only 2 of those 78 were listed on the top 50 candidates prior to any affirmative action by GMC.

The apprentice class in the Packard plant was placed in June 1995. Both Yeager and Polonus admit that they knew that they had not received positions at the Packard plant some time during the calendar year 1995. However, Yeager did not file a charge of discrimination until February, 1999, when he dual filed an EEOC/OCRC charge. Polonus did not file a charge until after February 2000.

The apprentice class at the Lordstown assembly plant was placed in 1996. Polonus filed an EEOC charge on May 5, 2000, in which he admitted that the alleged discrimination took place no later that November 11, 1996.

GMC now moves for summary judgment on both counts of the Supplemented Fourth Amended Complaint. GMC asserts that it is entitled to summary judgment on three grounds: 1) Plaintiffs lack standing to challenge hiring procedures that had no effect on their failure to obtain employment with GM; 2) Plaintiffs cannot prove that GM is that unusual employer who discriminates against the majority and thus cannot establish a prima facie claim of reverse race discrimination; and 3) Plaintiffs filed their EEOC charges

outside the applicable 300 day limitations period. Plaintiffs have filed a Brief and two Supplemental Briefs in Opposition to Defendant's motions for summary judgment and Defendant has filed reply briefs in support of both motions. This matter is now ready for decision.

II. STANDARD OF REVIEW

Summary judgment is appropriate when the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The burden of showing the absence of any such "genuine issue" rests with the moving party:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact.

Celotex v. Catrett, 477 U.S. 317, 323 (1986) (citing FED. R. CIV. P. 56(c)). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. The court will view the summary judgment motion in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of their easel *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941 (6th Cir. 1995) (citing *Celotex,* 477 U.S. at 322). Accordingly, "[t]he mere existence of a scintilla of evidence in support of the plaintiff' s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Copeland v. Machulis,* 57 F.3d 476, 479 (6th Cir. 1995) (citing *Anderson,* 477 U.S. at 252). Moreover, if the evidence presented is "merely colorable" and not "significantly probative," the court may decide the legal issue and grant summary judgment. *Anderson,* 477 U.S. at 249-50 (citations omitted). In most civil cases involving summary judgment, the court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252. However, if the non-moving party faces a heightened burden of proof, such as clear and convincing evidence, it must show that it can produce evidence which, if believed, will meet the higher standard. *Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1479 (6th Cir. 1989).

Once the moving party has satisfied its burden of proof, the burden then shills to the nonmover. The nonmoving party may not simply rely on its pleadings, but must "produce evidence that results in a conflict of material fact to be solved by a jury." *Cox v. Kentucky Dep't of Transp.,* 53 F.3d 146, 149 (6th Cir. 1995). FED. R. CIV. P. 56(e) states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of

> the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

The Federal Rules identify the penalty for the lack of such a response by the nonmoving party as an automatic grant of summary judgment, where otherwise appropriate. *Id.*

Though parties must produce evidence in support of and in opposition to a motion for summary judgment, not all types of evidence are permissible. The Sixth Circuit has concurred with the Ninth Circuit that "'it is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment.'" *Wiley v. United States,* 20 F.3d 222, 225-26 (6th Cir. 1994) (quoting *Beyene v. Coleman Sec. Servs., Inc.,* 854 F.2d 1179, 1181 (9th Cir. 1988)). FED. R. CIV. P. 56(e) also has certain, more specific requirements:

> [Rule 56(e)] requires that affidavits used for summary judgment purposes be made on the basis of personal knowledge, set forth admissible evidence, and show that the affiant is competent to testify. Rule 56(e) further requires the party to attach sworn or certified copies to all documents referred to in the affidavit. Furthermore, hearsay evidence cannot be considered on a motion for summary judgment.

Wiley, 20 F.3d at 225-26 (citations omitted). However, evidence not meeting this standard may be considered by the district court unless the opposing party affirmatively raises the issue of the defect.

> If a party fails to object before the district court to the affidavits or evidentiary materials submitted by the other party in support of its position on summary judgment, any objections to the district court's consideration of such materials are deemed to have been waived, and [the Sixth Circuit] will review such objections only to avoid a gross miscarriage of justice.

Id. at 226 (citations omitted).

As a general matter, the district judge considering a motion for summary judgment is to examine "[o]nly disputes over facts that might affect the outcome of the suit under governing law." *Anderson,* 477 U.S. at 248. The court will not consider non-material facts, nor will it weigh material evidence to determine the truth of the matter. *Id.* at 249. The judge's sole function is to determine whether there is a genuine factual issue for trial; this does not exist unless "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.*

In sum, proper summary judgment analysis entails "the threshold inquiry of determining whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson,* 477 U.S. at 250.

III. DISCUSSION

Defendants move for summary judgment on both claims based on the same three arguments: 1)that the Plaintiffs filed their EEOC charges outside the applicable 300-day limitations

period rendering their Title VII claims time barred; 2) Plaintiffs lack standing to challenge hiring procedures that had no effect on their failure to obtain employment with GMC; and 3) Plaintiffs have failed to submit any evidence that GMC is the "unusual employer who discriminates against the majority", a mandatory element of a prima facie reverse discrimination claim in the Sixth Circuit. These issues will reviewed in order with respect to both Counts of the Supplemented Fourth Amended Complaint.

A. Limitation Period--Equitable Tolling

Defendants allege that Plaintiffs' Title VII claim is time barred with respect to both Plaintiffs' claims regarding their 1995 Packard Plant applications and Polonus' 1996 Lordstown application.

In order to bring suit under Title VII in a "deferral state" such as Ohio, a plaintiff must have filed a charge of discrimination with the EEOC within 300 days of the alleged discriminatory act. *EEOC v. Penton Indus. Pub. Co.*, 851 F.2d 835, 837 n.5 (6th Cir. 1988); 42 U.S.C. §2000e-5(e). The 300-day limitations period begins to run on a claim for employment discrimination once the employee is aware or reasonably should be aware of the employer's employment decision. *EEOC v. United Parcel Service, Inc.*, 249 F.3d 557, 561-62 (6th Cir.2001) (*citing Delaware State Coll. v. Ricks*, 449 U.S. 250, 258, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980)); *Amini v. Oberlin College*, 259 F.3d 493,498-99 (6th Cir. 2001).

Both Plaintiffs were aware that they had not been hired into the Packard Plant apprentice program at some point in

1995. See Yeager Dep. at p. 75-82; Polonus Dep. at p. 70-72, Ex. H. Yeager's OCRC/EEOC charge is dated February 23, 1999, and on the charge Yeager asserts that the discrimination first occurred on January 13, 1995 and last occurred on September 6, 1998. Yeager asserts that he discovered the alleged disparate treatment on September 6, 1998 while reading through documents discovered in relation to a different charge. While Polonus' OCRC/EEOC charge is not dated, he explains that he filed it between February 25 and May 5 of 2000. In the box which requests the dates of the first and last discrimination, Polonus wrote that the first discrimination occurred on January 13, 1995 and the last incident occurred on February 1, 1995. In the body of his charge, Polonus states that he learned of new information on February 25, 2000, which led him to believe that he had been the victim of discrimination. Polonus Dep. Ex. H.

Similarly, with respect to Polonus' claim regarding the 1996 Lordstown apprentice program, Polonus was informed by GMC in 1996 that he had not been accepted into the 1996 Lordstown apprentice program because his test scores were not high enough. Polonus did not file his OCRC/EEOC charge until May of 2000. Again, Polonus states that he did not learn of Defendant's "targeting" practice until February, 2000. In its "Dismissal and Notice of Rights,"mailed to Polonus on July 18, 2000, the EEOC stated that it was closing its file on his charge because "[w]e cannot investigate your charge because it was not filed within the time limit required by law."

Plaintiffs' claims are clearly time barred unless the doctrine of equitable tolling applies to their claims. Although the Supreme Court has held that the 300-day period of

limitations for filing a charge with the EEOC is subject to waiver, estoppel, and equitable tolling, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982), the Sixth Circuit has cautioned that equitable tolling relief should be granted only sparingly. *Amini*, 259 F.3d at 500 (citations omitted).

Courts consider five factors in determining whether equitable tolling of the EEOC filing period is appropriate in a given case. The factors are: 1) lack of notice of the filing requirement; 2) lack of constructive knowledge of the filing requirement; 3) diligence in pursuing one's rights; 4) absence of prejudice to the defendant; and 5) the plaintiffs reasonableness in remaining ignorant of the particular legal requirement for filing his claim. *Amini*, 259 F.3d at 500 (*citing Truitt v. County of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998)citing *Andrews' v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988)). The decision whether to equitably toll a period of limitations must be decided on a case-by-case basis. *Truitt*, 148 F.3d at 648.

Plaintiffs do not assert that they lacked notice or constructive notice of the filing requirement or that they were ignorant of the particular legal requirement for filing their claims. Rather, Plaintiffs assert that the Defendant engaged in deception and other inequitable conduct. Specifically, Plaintiffs point to a statement on the RFI stating that "[q]ualified individuals are considered for employment without regard to race, color, religion, sex, or marital status. To help us comply with the Federal/State equal employment opportunity record keeping, reporting, and other legal requirements please answer the questions below. This information WILL NOT be used in evaluating your

qualifications." Plaintiffs point to similar statements on other forms throughout the application process. In addition, Plaintiffs state that Defendant never told them that their RFI's were never "targeted" for the Orientation Session. Yeager states that he was unaware of GM's targeting practice until September 6, 1998. Polonus states that his 300-day limitation should also be equitably tolled for the same "non-communication" and "deception" reasons articulated by Yeager.

GMC counters that Plaintiffs were not diligent in taking steps to determine who had been hired for the positions they sought. Further, Defendant contends that (notwithstanding Plaintiffs' "citation to out-of-context record snippets") there is no evidence that GMC did anything to hide who it had hired over Plaintiffs or the hiring processes that it employed. While it is difficult to believe that Mr. Yeager did not learn of GMC's targeting practice (or any other discriminatory practice that would have put him on notice) until after he had filed a reverse discrimination suit against GMC, it is possible to view some of the disclaimers on the RFI as misleading. Had Plaintiffs stated that they were African-American or female on the RFI they could have conceivably skipped the random draw step and have moved directly to the testing process. There was no indication from the statement on the RFI that only white males (and anyone who did not give information to suggest that they were a minority or a female) would be subject to the random selection process. Defendant does not argue that it would be prejudiced if equitable tolling were permitted. Accordingly, the Court narrowly finds that equitable tolling is warranted in this case. Yeager filed his OCRC/EEOC charge within 300 days of September 6, 1998, the date upon which he learned of GMC's targeting practice.

Polonus filed his OCRC/EEOC charge within 300 days of February 2000, the date upon which he claims that he first learned of GMC's targeting practice.

B. Standing

To satisfy Article III's standing requirements, a plaintiff must show: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; 2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Cleveland Branch, N.A.A.C.P. v. City of Parma,* 263 F.3d 513, 523-24(6th Cir. 2001) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.,* 528 U.S. 167, 180-81,120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

To show an injury in fact "in the context of affirmative action programs, the challenger need only show that, but for the program, he would have been considered for the job..." *Yeager v. General Motors Corp.*, 256 F.3d 389, 395 (6th Cir. 2001) ("Yeager I") (citing *Brunet v. City of Columbus,* 1 F.3d 390, 397 (6th Cir.1993)). Defendant asserts that Plaintiffs' claims fail because they have not presented any evidence to show that they would have been placed into an apprentice training position at the Packard Plant in 1995 or thereafter, absent (or "but for") implementation of the pre-apprentice program. With respect to Count II, Defendant asserts that Polonus has failed to submit any evidence that he would have been placed into an apprentice training position at the

Lordstown Plant in 1996 absent or but for implementation of the pre-apprentice program.

1. Count I--Packard Plant

Defendant has submitted evidence-the declaration of Pamela Anderson, the Administrator of the Technical Training and Apprentice Program at the Packard Plant since 1979--that demonstrates that neither Plaintiff would have been placed in the 1995 apprentice training class at the Packard Plant even if they had been selected in the random drawing.[5]

If Plaintiffs had been selected in the random draw, Defendant asserts that they would not have been permitted to take a second apprentice test in 1995 and thus would have had to transfer their 1989 test scores from the Lordstown Plant.[6]

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[5] Plaintiffs' RFI's were not among the 100 randomly selected from the 2000 RFI's submitted to GMC for the 1995 Packard Plant apprentice training program. Since they were not randomly selected, they were not considered further for admittance to the 1995 apprentice training program.

[6] GMC policy permits individuals to take the apprentice test two times. Before an individual may take the test a second time, he must demonstrate that he had undergone further education that would permit him to improve the scoring on the apprentice test. It is up to the joint committee at a particular plant as to whether an individual has sufficiently demonstrated eligibility to take the apprentice test a second time. If an individual is permitted to test twice, the higher of the two test scores is considered. Ms. Anderson states that an individual must remain on an applicant list for a period of at least one year before he may be permitted to take a second apprentice test at a new location. The earliest possible date

Yeager's test score in 1989 was 32 and Polonus' test score was either 22 or 26.[7] Assuming that Plaintiffs had scored the maximum on their interview for each trade (27 points), Yeager's highest possible raw score would have been 59 and Polonus' highest possible raw score would have been 53.

For the 1995 apprentice class at the Packard plant, the Packard plant joint committee determined that 12 apprentices would be hired in the Electrician trade, 24 apprentices would be hired in the Tool and Die trade and 6 apprentices would be hired in the Industrial Mechanic trade. Under the collective bargaining agreement's seniority-to-non-seniority provisions, GMC could hire 4 non-seniority apprentices in the Electrician trade, 8 non-seniority apprentices in the Tool and Die trade and 2 non-seniority apprentices in the Industrial Mechanics trade.[8] Based upon the raw scores, and without regard to affirmative action considerations, neither Plaintiff would have been ranked high enough in any trade to be selected for the 1995 Packard apprentice program. In the Electrician trade (in

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that Plaintiffs could have taken the apprentice test a second time at the Packard Plant was 1996.(See Anderson Dec. ¶¶14-21). Plaintiffs state, without detail or support, that they were "retest eligible" in1995 "with additional education, training, experience, etc. in the interim...." (Yeager Aft. at ¶6; Polonus Aft. at ¶4). The Court is not required to accept Plaintiffs' unsupported allegations.

[7] Polonus states that his 1989 test score was 26. Both Plaintiffs retested at Lordstown in 1996. Yeager scored 33 on that test and Polonus scored 22 or 26. Both parties agree that Polonus' scores were 22 and 26. The order of the scores is not material.

[8] Plaintiffs were not, and are not GM employees and thus, are "non-seniority".

which 4 non-seniority applicants were selected) there were at least 24 non-seniority white males with higher final raw scores than Plaintiffs. There were at least 47 non-seniority white males with higher final raw scores than Plaintiffs in the Tool and Die trade. There were 43 non-seniority white males with higher final raw scores than Plaintiffs in the Industrial Mechanic trade. The evidence is clear that without regard to any affirmative action, targeted recruiting or any other procedures challenged by Plaintiffs, neither would have received an apprentice position at the Packard Plant in 1995.[9]

Both Plaintiffs took the apprentice test a second time in 1996 at the Lordstown Plant. Yeager achieved a test score of 33 and Polonus achieved a test score or 26.[10] Assuming that each Plaintiff attained the highest interview score in any trade for which he applied, the highest possible raw score for

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[9] Plaintiffs' attempt to avoid the outcome of "Yeager I" by asserting that "but for GMC's refusal to target Plaintiffs and invite them to PAP because of their race or gender, they would have been selected for the apprentice program" is unavailing. The District Court and the Sixth Circuit found that the causal connection required for Article III standing did not exist because Yeager would not have been selected to the 1996 Lordstown apprentice program regardless of the targeting and the PAP.. *Yeager,* 265 F.3d at 396. In their Supplemented Fourth Amended Complaint Plaintiffs state that they were injured as a result of GMC's affirmative action practices and as a result were not hired into the apprentice classes. (See ECF #40 at Count I, ¶11 and Count II, ¶3) Thus, this is not the "converse" argument.

[10] Or 22, depending upon which affidavit is relied on. For purposes of these motions the Court will assume that Polonus achieved a 26 on both tests.

Yeager would be 60 and for Polonus would be 53. As shown above, without regard to any affirmative action, neither Plaintiff would have been selected for the 1995 Packard apprentice class with their 1996 test scores. Accordingly, Plaintiffs do not have standing to assert their claims in Count I and Defendant's Motion for Partial Summary Judgment as to Count I is granted.[11]

2. Polonus' Claim regarding the 1996 Lordstown apprentice program

Polonus also brings suit over his failure to obtain a position in the Lordstown Plant apprentice program of 1996. Yeager made this same claim in earlier litigation. In that case the District Court granted summary Judgment in favor of GMC finding that Yeager did not have standing because his final raw score was not within the top 50 and several white males had scores higher than his, without regard to affirmative action considerations. The Sixth Circuit affirmed, ruling that GMC's failure to accept Yeager into the 1996 Lordstown apprentice training program did not constitute an injury in fact because there was no causal connection between GMC's training program for minorities and women and Yeager's injury. *Yeager,* 265 F.3d at 396.

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[11] The evidence demonstrates that Plaintiffs would not have been selected to any of the apprentice classes placed at the Packard Plant in 1996,1997, 1998, and 1999. Without regard to any affirmative action, there were always significant numbers of white males ahead of Plaintiffs in all trades who would have been selected before Plaintiffs. (See Anderson Dec. at ¶¶26-36.)

The Court finds that Yeager I is controlling here. As discussed above, Yeager's highest possible final raw score was 60 and Polonus' highest possible raw score was 53. As in Yeager I, Polonus was not injured by the affirmative action programs because GM hired 50 apprentices in 1996 at the Lordstown Plant and 50 candidates with higher unadjusted raw scores outranked Polonus. Accordingly, the Court finds that Polonus lacks standing to assert his Title VII claim in Count II. Defendant's Motion for Summary Judgment as to Count II is granted.

C. Reverse Discrimination

Defendant argues that even if Plaintiffs had standing to assert their claims of reverse discrimination, they could never prove an essential element of the prima facie case, i.e., background circumstances supporting the suspicion that the defendant is "the unusual employer that discriminates against the majority."

The Sixth Circuit has adopted the following standard in cases involving claims of reverse discrimination:

> A prima facie case of "reverse discrimination" is established upon a showing [1] that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority,"... and upon a showing [2] that the employer treated differently employees who were similarly situated but not members of the protected class.

Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 (6th Cir. 1994) (citations omitted.)

Where a prima facie case of discrimination has been demonstrated, the employer must then produce evidence of legitimate, nondiscriminatory reasons for its action. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817,36 L.Ed.2d 668 *(1973); see also Ang v. Procter & Gamble* Co., 932 F.2d 540, 548 (6th Cir.1991). If the employer is able to rebut the plaintiff's prima facie case, the burden is on the plaintiff to discredit the employer by showing the proffered reasons were pretextual. *See Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *Ang,* 932 F.2d at 548. Alternatively, a plaintiff can establish a case of reverse discrimination by demonstrating that race was a direct factor in the employment decision. *Weberg v. Franks,* 229 F.3d 514, 522 (6th Cir. 2000) Direct evidence requires the conclusion that the employer's actions were motivated, at least in part, by unlawful discrimination, *Id.*

1. The Packard Plant

Defendant submits several statistics indicating that GMC did not and does not discriminate against the majority at the Packard plant. As of February 2000 the Packard plant employed 149 persons in the skilled trades apprentice training program and 115 of those (more than 77%) were white males. Since 1993 the Packard plant has hired 221 apprentices, 161 of whom were white males. Around the time of the 1995 and 1996 apprentice classes, in the combined apprentice trades, the demographic makeup in the Packard plant was over 70% white males (68 out of 96 apprentices).

Moreover, Defendant refers to *Garnet v. General Motors Corp.*, 114 F. Supp. 2d 649, 657 (N.D. Ohio 2000), where the District Court held that the white male plaintiff alleging reverse discrimination when he was not hired into the Packard plant's apprentice program could not prove the requisite "background circumstances" necessary to sustain a prima facie case. The plaintiff asserted that the very premise of the pre-apprentice training program is that of discriminating against the majority. The Court disagreed finding that: "[m]erely administering a program which affords women and minorities greater opportunities to obtain positions in a workforce that is dominated by white males does not rise to the level of intentional discrimination against the majority. As such, the Plaintiff cannot establish the elements of a prima facie case of reverse discrimination...." *Garnet*, 114 F. Supp. 2d at 658. The Sixth Circuit affirmed the District Court's decision holding that Plaintiff failed to provide direct evidence of discrimination because that evidence (the PAP) "does not violate Title VII, *Plott v. Gen. Motors Corp.*, 71 F.3d 1190, 1194- 95 (6th Cir. 1995); consequently, the mere existence of the PAP is not direct evidence of reverse discrimination." *Garnet v. General Motors Corp.*, 2001 WL 1136003, *2, unreported (6th Cir. Sept. 21,2001).

In response, Plaintiffs assert that for the reasons stated in the *Garnet* Petition for Rehearing and by virtue of the presence of "Targeting", and "30/30/30" in addition to the PAP, Plaintiffs have presented sufficient "direct" evidence to make a prima facie case. ECF #49 at p. 12. After the Sixth Circuit denied Garnet's Request for Rehearing on November 2, 2001, Plaintiffs filed a Second Supplemental Memorandum asserting two more reasons why GMC is the unusual employer who discriminates against the majority. Plaintiff

refers to the Packard plant's Utilization Analysis from its 2000 Affirmative Action Plan. That document states that the Apprentice group size is 138 and that employment of minority is 8.7 and female is 13.8 as compared to the availability of minority-3.9 and female 3.4. Consequently, neither minorities nor females are underutilized in the Apprentice category. Plaintiff also attaches an excerpt of the deposition of Clifford Roberts who stated that it was an informal policy to keep affirmative action plans for two years, the current plan and the year's before. Mr. Roberts also stated that he was unaware of any requirement of the Department of Labor that requires employers to keep its affirmative action plans for five years.[12]

Thus, it appears that Plaintiff contends that GMC's failure to underutilize minorities and females, or conversely, its slight over-utilization of minorities and females, along with its policy to discard affirmative action plans alter two years is sufficient evidence to demonstrate GMC's intentional discrimination against the majority. The Court disagrees. The Utilization Analysis is not well defined. It appears to show that there are slightly more minorities and women in the Apprentice program than the numbers of minorities and women who are available. The chart does not define "Availability" or designate where the population or what the population of minorities and women is. Moreover, while the Court would never condone the unlawful destruction of evidence, a GMC policy, assuming that it is a GMC policy--Mr. Roberts seemed to be somewhat unaware of GMC policy

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[12] The cover page of the Roberts Deposition indicates that it was taken on August 15, 1991. The Court presumes that the correct date is August 15, 2001.

or federal regulations--to discard affirmative action plans after two years does not indicate that GMC is engaging in intentional discrimination against white males. The fact that GMC administers affirmative action programs, including the PAP, targeting and 30/30/30, does not constitute direct proof of intentional discrimination against the majority. The evidence is clear that despite these affirmative action programs the Apprentice Program at the Packard plant is filled primarily with white males. Accordingly, Plaintiffs have not shown direct evidence of GMC's intentional discrimination against white males in the Packard plant. Defendant is entitled to summary judgment on Count I for the additional reason that Plaintiffs have not demonstrated that GMC is the "unusual employer who discriminates against the majority".

2. The Lordstown Plant

The statistics provided by Defendant with regard to the population of the skilled trades at Lordstown demonstrate that the individuals in the skilled trades were overwhelmingly white and male. As of January 1996, 82 out of 97 persons in the Millwright trade were white males; 63 out or 74 persons in the Pipefitter trade were white males; 65 out of 72 persons in the Tool Making trade were white males; 21 out of 26 persons in the Truck Repair trade were white males, and 92 out of 103 persons in the WEMR trade were white males. After the 1996 apprentice class was placed, as of January 1997, 40 of the 62 persons in the apprentice training program (76%) were white males. (See Dec. of Dan Pedigo at ¶19).

In Yeager I, the Sixth Circuit addressed this issue with respect to Yeager's 1996 application to the Lordstown

apprentice program and found that "[t]here is no evidence that GMC is the unusual employer that discriminates against the majority. *Yeager,* 265 F.3d at 397. Polonus has not submitted any evidence of intentional discrimination at the Lordstown Plant. The evidence submitted with Plaintiffs' Second Supplemental Brief concerned the Packard plant. For the reasons stated above, it does not show intentional discrimination by GMC against the majority, either at the Packard plant or the Lordstown plant. Accordingly, Defendant is entitled to summary judgment on Count II for the additional reason that Polonus has failed to demonstrate this necessary element of the prima facie reverse discrimination case.

IV. CONCLUSION

For the reasons stated herein, Defendant's Motions for Partial Summary Judgment (ECF #31--as to Count I and ECF #42 as to Count II) are GRANTED. This action is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

/s/ _____
DONALD C. NUGENT
United States District Judge

DATED: December 17, 2001

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article III, Section 2, Clause 1:

Jurisdiction of Courts. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -to all Cases affecting Ambassadors, other public Ministers and Consuls; -to all Cases of admiralty and maritime Jurisdiction; -to Controversies to which the Untied States shall be a Party; -to Controversies between two or more States; -between a State and Citizens of another State; -between Citizens of different States; -between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

42 U.S.C. §2000e-2(a)

"Employer practices
It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."